

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

THOMAS F. MCCANN,)	
)	No. 62858-5-I
Appellant,)	
)	
v.)	UNPUBLISHED OPINION
)	
CATHERINE M. PALMER,)	
)	
Respondent.)	FILED: <u>May 3, 2010</u>
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Schindler, J.— Thomas McCann appeals the trial court order denying his motion to find Catherine Palmer in contempt for violating the parties’ parenting plan and awarding Palmer attorney fees she incurred in responding to McCann’s motion for contempt and fees she incurred on revision and reconsideration. We affirm and award Palmer her reasonable attorney fees on appeal.

FACTS

Thomas McCann and Catherine Palmer are the parents of a son born in 1990 and a daughter born in 1992. In 1998, the parties’ marriage was dissolved, and a parenting plan was entered. The children’s residential time

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was split between the parents. Over the years there was ongoing conflict between the parents about the terms of the parenting plan. In an effort to reduce the conflict, the parents participated in an extensive arbitration process with a retired judge. In March 2008, the parents signed and filed a modified parenting plan, and the court adopted and approved it as the court's order. The children's residential time continued to be split between the parents. The modified parenting plan set out a detailed decision-making plan regarding routine and non-routine health care, school enrollment, educational decisions, school activities, other extra-curricular activities, and transportation to and from such activities.

The modified parenting plan also included a detailed three-step plan for problem solving and dispute resolution. The first step requires the parents to communicate with each other in an effort to resolve a dispute without outside assistance. The parent identifying the problem initiates the process, and the other parent must respond within a set time. If a dispute remains unresolved, the second step requires the parents to use the family counseling services of one of three identified options. The parent identifying the problem selects the counseling option, subject to the availability of the option at the time. If a dispute remains unresolved after family counseling, the third step is to submit the dispute to binding arbitration or to the family law motions calendar. The

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parent responding to the dispute selects whether to use arbitration or family court.

Under the modified plan, Palmer has responsibility for routine health care for the son, and McCann has responsibility for routine health care for the daughter until age seventeen. In August 2008, McCann filed a motion to find Palmer in contempt, alleging four specific instances in which she allegedly failed to comply with the parenting plan: (1) failing to keep McCann informed of the outcome of a medical appointment for their son; (2) scheduling and taking the daughter to a dental cleaning appointment; (3) failing to ensure the daughter takes her prescribed daily medication when in Palmer's care; and (4) failing to pick up the daughter on time on March 24, 2008.

McCann also alleged that Palmer failed to comply with the dispute resolution process. He alleged that after the modified parenting plan was entered, he raised nine points the parents needed to resolve, that Palmer failed to respond to some of the points, and that he initiated the second step of the dispute resolution process by selecting family counseling offered by Palmer's employer, but Palmer refused this option.

Palmer opposed the motion for contempt and filed a responsive declaration in which she responded to each of McCann's allegations. Palmer argued that she did not violate the parenting plan as to any of the allegations

regarding medical and dental care.¹ As to the allegation regarding failure to timely pick up the daughter, Palmer stated that both parties had forgotten it was a no-school day and she provided copies of communications indicating both parents had conflicts with transportation and the efforts to resolve it. Palmer also challenged the allegation that she failed to follow the dispute resolution process, arguing that she was not required to use the limited free counseling made available by her employer, particularly where the other free counseling option in the parenting plan was available.²

On September 25, 2008, a court commissioner heard McCann's contempt motion. The commissioner noted that many of the alleged violations of the modified parenting plan arose less than a month after it was entered and that a finding of contempt under RCW 26.09.160 required the court to find that Palmer acted in bad faith. After considering the evidence and argument, the commissioner entered findings of fact, conclusions of law, and an order that Palmer was not in contempt. The findings provide:

- (1) Mrs. Palmer did not fail to keep the father informed of the outcome of [the son's] medical appointments. Mr. McCann attended both doctor's appointments and received copies of the doctor's notes and recommendations. The physical therapy appointments were therapy

¹ As to the allegation that Palmer failed to ensure the daughter regularly took prescribed medication, Palmer provided doctor's notes contradicting McCann's allegation.

² Palmer stated that the employer supported counseling allowed only eight sessions per year, that she had used some sessions for herself and expected to use additional ones, that McCann could choose one of the other counseling options set out in the plan, and she would participate.

and Mrs. Palmer did not attend. She was under no obligation to inform him about the outcome of physical therapy appointments. There was no bad faith and Mrs. Palmer is not in contempt.

- (2) Mrs. Palmer did not violate the parenting plan by scheduling [the daughter's] medical appointments. The medical appointments were scheduled prior to the entry of the current parenting plan and Mrs. Palmer gave Mr. McCann the option to reschedule. He did not. There was no bad faith and Mrs. Palmer is not in contempt.
- (3) Mrs. Palmer did not fail to insure the children are regularly taking their medication in conformity with the parenting plan. The appointment that Mr. McCann complained about occurred prior to the entry of the current parenting plan and there is no evidence that Mrs. Palmer failed to insure their 16-year-old daughter [took her] medication. There was no bad faith and Mrs. Palmer is not in contempt.
- (4) Mrs. Palmer did not fail to comply with the scheduled residential pick up times willfully and in bad faith. The December 2007 allegation occurred prior to the entry of the current parenting plan. The March 24, 2008 late pick up was not in bad faith. Mrs. Palmer, as evidenced by the e-mail, honestly forgot that there was no school on that day and she had work commitments that prevented her from picking up Kelly at 5:30 p.m. There was no bad faith and Mrs. Palmer is not in contempt.^[3]
- (5) Mr. McCann, as evidenced by the email that was provided, did not set forth any specific items that needed to be resolved via dispute resolution.^[4] Thus, Mrs. Palmer is not in contempt of failing to follow the dispute resolution process. However the court notes that the parenting plan provides that the party invoking the dispute resolution process gets to choose the method and the other party does not get

³ In its oral decision, the court noted the children's ages, nearly eighteen and sixteen, and observed, "[T]his is not contempt, folks, this is life."

⁴ In its oral decision, the commissioner explained that Palmer had responded to McCann's list of nine issues, that none of McCann's current allegations were the subject of his earlier list of issues for which he sought to invoke the counseling provision, and that the record before the court regarding resolution of some of the original nine issues was incomplete.

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to debate the necessity.

The court denied Mr. McCann's motion for contempt on all issues, found McCann brought the motion without a reasonable basis, and awarded Palmer \$1,451.00 in attorney fees she incurred in responding to the motion.

McCann moved to revise the commissioner's ruling. Initially, the court revised the commissioner's decision as to the allegation that Palmer failed to pick up the daughter on time. The court ruled that although the dispute arose from a mutual misunderstanding, Palmer technically violated the plan. The court vacated the award of attorney fees to Palmer. The court found no other violations of the parenting plan, noting that McCann's motion was not brought in good faith, and declined to award McCann attorney fees.

Palmer moved for reconsideration, arguing that she did not violate the parenting plan regarding picking up the daughter and that the court's decision to the contrary was based on incorrect information McCann set forth in his reply to the revision motion. Palmer asked the court to reinstate the prior attorney fees and award her additional fees for the revision hearing.

The court granted reconsideration and denied McCann's motion to revise the commissioner's ruling, finding Palmer did not violate the parenting plan, technically or otherwise. The court awarded Palmer attorney fees of \$3321.50, which represented \$1451.00 previously awarded, plus \$1920.50 for

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the motions for revision and reconsideration.

McCann appeals.

ANALYSIS

Contempt

McCann contends that the superior court erred in failing to find Palmer in contempt for violating the parenting plan. He reiterates the arguments he made below regarding each of Palmer's alleged violations of the parenting plan. He also argues that reversal is required because the superior court did not enter findings of fact in support of its decision.

On a motion to revise a commissioner's ruling, in cases like this one where the evidence before the commissioner did not include live testimony, the superior court judge's review of the record is de novo. In re Marriage of Moody, 137 Wn.2d 979, 993, 976 P.2d 1240 (1999). When the court makes independent findings and conclusions, the court's revision order supersedes the commissioner's decision. In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). But when the superior court denies the motion to revise, the commissioner's decision remains unchanged, and the commissioner's findings, conclusions, and order become those of the superior court. In re Dep. of B.S.S., 56 Wn. App. 169, 170-71, 782 P.2d 1100 (1989). Separate findings and conclusions by the superior court are not required. In re B.S.S., 56 Wn.

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App. at 171.

Here, the superior court initially revised a single aspect of the commissioner's ruling and found that Palmer technically violated the parenting plan when she failed to pick up the daughter by 5:30 on March 38, 2008. But on reconsideration, the court found Palmer did not violate the parenting plan, technically or otherwise. Thus, the commissioner's findings, conclusions and order became the decision of the superior court. Contrary to McCann's argument, the superior court on revision was not required to enter its own findings and conclusions. In re B.S.S., 56 Wn. App. at 171.

Whether contempt is warranted in a particular case is within the sound discretion of the court. In re Marriage of Thompson, 97 Wn. App. 873, 877, 988 P.2d 499 (1999). We will not disturb the trial court's decision on contempt absent a manifest abuse of discretion. In re Marriage of James, 79 Wn. App. 436, 439-50, 903 P.2d 470 (1995). To find a parent in contempt, the court must make a specific finding of bad faith. RCW 26.09.160(2)(b).⁵ When the trial court weighs competing documentary evidence to make credibility determinations regarding bad faith, we review the findings for substantial

⁵ RCW 26.09.160(2)(b) provides:

If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court.

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evidence. In re Marriage of Rideout, 150 Wn.2d 337, 351-52, 77 P.3d 1174 (2003).

The trial court found that Palmer did not violate the parenting plan and she did not act in bad faith as to any of the alleged violations. The court's findings are supported by substantial evidence. There was no abuse of discretion in finding Palmer was not in contempt.

Attorney Fees

McCann contends that the court erred in awarding Palmer attorney fees. Under RCW 26.09.160(7), if the court finds that a motion for contempt was brought without a reasonable basis, the court shall order the moving party to pay the nonmoving party's attorney fees.⁶ The trial court found that McCann's motion for contempt was brought without a reasonable basis. The finding is supported by the evidence and the court's findings that Palmer did not violate the parenting plan and did not act in bad faith. Under the statute, the court properly awarded Palmer attorney fees incurred in responding to the contempt motion.

Reconsideration

⁶ RCW 26.09.160(7) provides:

Upon motion for contempt of court under subsections (1) through (3) of this section, if the court finds the motion was brought without reasonable basis, the court shall order the moving party to pay to the nonmoving party, all costs, reasonable attorneys' fees, and a civil penalty of not less than one hundred dollars.

McCann contends that the trial court erred in granting Palmer's motion for reconsideration. He argues that the order on reconsideration was not clearly written, the court erred in considering evidence Palmer raised for the first time on reconsideration, and the court erred in ordering him to pay attorney fees Palmer incurred on revision and reconsideration.

We review a trial court order on reconsideration for a manifest abuse of discretion. Drake v. Smersh, 122 Wn. App. 147, 150, 89 P.3d 726 (2004). There is nothing unclear about the trial court order. The relevant language provides that the motion for revision is denied, Palmer did not violate the parenting plan, and Palmer is awarded attorney fees against McCann in the amount of \$3321.50 ("includes judgment for attorney fees awarded by Court Commissioner and additional \$1920.50 for revision and motion for reconsideration.").

Nor has McCann demonstrated an abuse of discretion. McCann's argument that the court improperly considered new evidence is inconsistent with his argument in the superior court. Moreover, Palmer raised the evidence in response to McCann's argument made for the first time in his reply on revision. Furthermore, the parties' arguments over the pickup time depended as much on interpretation of the parenting plan provision applicable when one of the children's activities, here the daughter's water polo practice, began when

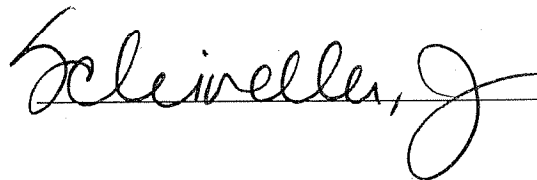
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the children were in transition from one parent's residential time to the other's, as it did on a dispute over the actual pickup time. We find no abuse of discretion in granting reconsideration on this issue. The court declined to revise the commissioner's ruling on any of the other alleged violations of the parenting plan. The court commissioner's decision, that Palmer was not in contempt and that McCann's motion for contempt was brought in bad faith, became the superior court's decision. The court did not abuse its discretion in reinstating the commissioner's award of attorney fees to Palmer and awarding Palmer additional fees she incurred on revision and reconsideration.

Attorney Fees on Appeal

Both parties seek attorney fees on appeal. There is no basis to award McCann attorney fees on appeal. Palmer's request is based on RCW 26.09.160(7) and RAP 18.9(a), which provides for an attorney fee award for a frivolous appeal. Upon compliance with RAP 18.1, we award Palmer her reasonable attorney fees on appeal under RCW 26.09.160(7). See In re Rideout, 150 Wn.2d at 359 (a party is entitled to an award of attorney fees on appeal to the extent they relate to the issue of contempt).

Affirmed.

A handwritten signature in black ink, appearing to read "Schneider, J.", with a large, stylized flourish at the end.

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WE CONCUR:

Appelwick, J.

Dupe, C. S.